

The Evidence of Law in Wisconsin

Leonard P. Baumblatt

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- III. In replevin a plea may set up *non cepit*, property in the defendant or in a stranger, although these pleas are inconsistent.
1. The plaintiff must show right of possession in himself, and to meet this a defendant may interpose and prove inconsistent pleas.
- IV. Under a plea of property in another than plaintiff, the defendant may show that the title or the claim to right of possession of the plaintiff was fraudulently obtained.
1. It is not necessary under this plea specially to allege fraud.
 2. Under the common law, if the plaintiff fails to show title, it was immaterial, whether the defendant showed title in himself or not.
 3. A plaintiff, who knows what title he has, showing title by a transfer of a questionable nature, is not surprised when his title is attacked for fraud.
 4. Replevin is a proper action to test title and anybody who claims an interest in the property may enter the contest.

THE LAW OF EVIDENCE IN WISCONSIN.

PART THREE.

THE THEORY OF ADMISSIBILITY.

I. Multiple admissibility.

1. The principle of multiple admissibility is that evidence may be admissible for *one* purpose and not for one or more other purposes. From this principle it follows:
 - A. That an offer of evidence made generally should be received if admissible for some purpose, even though it would be inadmissible if offered for some other purpose.
 - B. But if you make an offer for a specific purpose, for which purpose it is not admissible, and the judge rejects it, that rejection is correct even though it would be admissible for some other purpose.

II. Curative admissibility.

1. The principle of curative admissibility is that you can admit anything to cure erroneous admission of irrelevant evidence on the other side.

III. Conditional admissibility.

1. The principle of conditional admissibility is applicable when the relevancy of an offer of fact is not apparent to the court, in which case the court can ask to have the relevancy shown; and if it depends on other facts, the court can pledge you to bring in such other facts.

IV. Mode of introducing evidence.

1. The offer.

- A. Where evidence is admissible for one purpose and for no other purpose, offer it for the specific purpose for which it is admissible.
- B. Where there are two pieces of evidence, one of which is admissible and the other inadmissible, an offer combining the two pieces may be rejected as a whole.
- C. Evidence may be offered generally if the materiality and relevancy appear on the face thereof, but if the court doesn't see it, an explanation must be given.

But, if the purpose of the offer is attached to it, and the question is raised after trial, the fact that afterwards it is found that the evidence is offered for other purposes, it would be inadmissible; yet, if good as to the offer it is limited to, it is good.

2. The objection.

- A. Objection to a witness' qualifications should be made as soon as the witness takes the stand, except where the party had no prior notice of the disqualifying fact.
- B. Objection to a witness' qualifications who makes a deposition should be objected to either—

Secs. 4091, 4092.

- a. At the time of making the deposition, or
- b. At the time the deposition is received by the court clerk, by a motion to strike the deposition from the files at such filing time.
- c. But, where the disqualification would be absolute, objection may be taken at the time of the trial.
- C. Other objections must be taken or made at the time the evidence is offered, or as soon as it comes to the party's knowledge.
- D. A general objection, if overruled, cannot avail unless on the face of the evidence no possible valid use could be made of it.

E. A special objection which is sustained or overruled is valid only for the ground which it mentions and the fact that you might have specified other grounds does not give you the right to take advantage of such other grounds of appeal, with this EXCEPTION—

a. That if it appears on appeal that the opponent could not have possibly cured the defect, then although you didn't mention the other grounds, the special objection can give effect to the unmentioned rule, if that likewise could not have been cured.

3. The ruling.

A. The judge may revoke a ruling even after evidence is admitted, and order it struck out, instructing the jury to disregard it.

B. By "discretion" of trial judge, is meant he is not controlled by fixed rules and can do as he sees fit. Of this there are but two cases—

a. Determining if expert is qualified.

b. Determining order of introducing evidence.

As to whether the Supreme Court will interfere in such cases on appeal, the rule is—

a. If ruling on discretionary matter, then the Supreme Court will rarely set aside the lower court's ruling; what they do, is to reverse only for abuse of discretion.

C. A court commissioner can compel answers to questions, and if the witness refuses to answer such questions, he can apply to the court.

4. The exception.

A. In this state, if an objection is made and overruled, it is deemed excepted to in some courts, but the safe practice is to take exception immediately.

5. New trial for erroneous ruling.

An erroneous ruling on evidence may be ground for a new trial where it obviously led the jury to take an unfavorable view of the losing party's case.

V. Order of introducing evidence.

I. In general.

A. Evidence in chief.

B. Defendant's case.

C. Rebuttal — can only put in so much as becomes relevant, and can put in nothing you could have put in in chief.

D. Sur-rebuttal.

NOTE — But the above rules are subject to the discretion of the judge so as to secure justice.

2. Order of examining witnesses.

A. Examination in chief.

B. Cross-examination.

C. Rebuttal.

D. Sur-rebuttal.

TO WHOM EVIDENCE IS TO BE PRESENTED.

I. In general the jury determines questions of fact.

II. In general the court may not express his opinion on the sufficiency of proof of fact.

III. In certain specific exceptional cases the judge determines a question of fact. They are:—

1. As to admissibility of evidence and competency of witness.

2. Construction of documents.

IV. On the whole mass of evidence the judge has power to say, "There is not sufficient evidence on which to permit twelve men to find a verdict," and in this way he has power to pass on the sufficiency of the evidence, and has power to take the case from the jury.

BY WHOM EVIDENCE IS TO BE PRESENTED.

I. Measure of jury's persuasion.

1. There are three stages of mind:— Skepticism, Preponderance, and Beyond a Reasonable Doubt. Now, when an issue of fact is submitted to the jury, they must be persuaded beyond a reasonable doubt in criminal cases, and by the preponderance of evidence in a civil case before they can give a verdict for the party having the burden of proof.

II. Party's risk of non-persuasion of the jury.

1. Burden of proof. — Anybody that wants anything has burden of proof. It says to the plaintiff, "You must show certain facts before you can recover." After the plaintiff has shown these facts, then the defendant has burden. The burden of proof is thus distributed:

- A. It is first allotted in pleading.
- B. It then comes up on trial.

2. Rules on burden.

- A. After hearing a case, if the jury can't make up their mind, the verdict goes against one who has burden, that is risk of non-persuasion.
- B. Before a case gets to the jury, if one has burden and he has proved everything he is required to in such case, the balance will be presumed, and he *rests*. It is now up to the defendant to go on and prove the rest.

Example — To prove death.

Facts necessary:

- 1. The boat went down.
- 2. John was on boat and never heard of again.

Presumption:

- 3. John was drowned.

The burden is now shifted.

Fact to explain — Presumption:

- 1. John was seen in New York two weeks later.

NOTE — This meets plaintiff's proof and throws burden back on plaintiff, while if defendant had not answered, verdict would have been for plaintiff.

- C. If the jury goes out, and can't decide, the verdict goes against one having affirmative.
- D. The question of who has the burden in special cases is a question of substantive law.

III. Party's duty of satisfying the judge.

1. Sufficiency of mass of evidence.

- A. Where the judge rules on the sufficiency of the whole evidence to go to the jury (called Directed Verdict), he applies this test: "Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?"
- B. Where the defendant at the close of the plaintiff's case asks for a ruling on the sufficiency of the plaintiff's evidence, and the ruling is erroneously in favor of the plaintiff (called Non-suit), but the defendant then proceeds to put in his evidence, he cannot on appeal take

advantage of the erroneous ruling, as by failing to stand on his objection he waives his right to object.

2. Specific presumptions. — Presumptions are those facts which will be granted from showing certain facts.

Sections 4192 to 4202m.

*OF WHAT FACTS NO EVIDENCE NEED BE
PRESENTED.*

I. Judicial admissions.

- A. A stipulation or judicial admission must be in writing to be binding, unless made in court.

Note Section 4184.

II. Judicial notice.

- A. Courts will notice commonly without evidence political facts.
- B. They will also notice their own proceedings.

NOTE — For a list of what will be judicially noticed, see Simmon's Digest under "Judicial Notice."

THE SO-CALLED PAROL EVIDENCE RULES.

The parol evidence rules are not rules of evidence, nor are they parol, nor do they only concern parol or writing.

I. Act void for incompleteness.

1. A document on its face apparently completely executed and binding can be shown not to be binding because delivered on a condition that was never fulfilled.

II. Act void for lack of intent.

1. A document apparently executed may not be shown void on ground that the party signing it was in good faith ignorant of its contents, unless when he signed it he was not careless under the circumstances and acted as any reasonable man would have done.
2. A document duly signed may be corrected or reformed where the terms as executed were by mutual mistake different from the terms as understood by both.

III. Integration of legal act.

1. Ordinary transactions.

- A. Principle. — The principle is that if the whole transaction is reduced to writing, that is final; but if not intended to cover the whole transaction, it may be explained by parol.

B. Applications of principle.

- a. An ordinary receipt is not intended to cover entire transaction and, consequently, it may be contradicted. But if the contract and receipt is mentioned, it may be part of the entire transaction and cannot be contradicted.

2. Judicial records.

A. In general.

- a. Judicial records must be in writing, and if the record is lost, it may be proved by parol or the minutes.
- b. But if no record was made, it cannot be proved by parol.

B. Jury's verdict.

Whether a juror's affidavit may be read to show jury's misconduct to set aside verdict?

- a. If it was outward misconduct, such can be shown.
- b. But if mere deliberations, it must be buried forever, and no testimony is admissible from anybody on this.

C. Corporation records.

IV. Interpretation of legal acts.

1. Standard of interpretation.

- A. To interpret words in a will, first use dictionary meaning. But you can leave dictionary standard if it can be shown the party spoke with a view to another standard.

But, you cannot disturb a clear meaning.

2. Standard for determining intention.

A. Declarations of intention.

- a. Where a will describes beneficiary, you can go to testator's declarations of intention to find particular beneficiary.

B. False description.

- a. Where a description doesn't fit every part (of land) we can discard what testator did not deem essential and fit it to part that testator deems essential.

(1) But you can't show testator's intention to change description.

LEONARD P. BAUMBLATT, 1920.